NO. 92-1558

In The Supreme Court of the United States

October Term, 1992

GEORGE GUY DERDEN, III

PETITIONER

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

VERSUS

SHERIFF SAMMIE McNEEL AND
MISSISSIPPI DEPARTMENT OF CORRECTIONS

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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43 pp

QUESTIONS PRESENTED

1. Whether this cause, arising from the Fifth Circuit Court of Appeals which now stands with the majority of circuits in recognizing cumulative error as a basis for habeas relief, presents the meaningful litigation required for the grant of certiorari?

2. Whether, given the opportunity afforded by cumulative error relief to aggregate, without limit, adverse trial events, the standards imposed by the lower court's opinion provide reasonable confines within which to review such a claim?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED 2

STATEMENT OF THE CASE 3

A. Procedural History. 3

B. Statement of Facts. 14

REASONS FOR DENYING THE WRIT 15

ARGUMENT 16

I. This cause, arising from the Fifth Circuit Court of Appeals which is now aligned with the majority of circuits in recognizing cumulative error as a basis for federal habeas relief, does not present the meaningful litigation required for a grant of certiorari. 16

II. Given the opportunity afforded by cumulative error relief to aggregate, without limit, adverse trial events, the standards imposed by the lower court's opinion provide reasonable and needed confines within which to review such a claim. 24

CONCLUSION 35

CERTIFICATE OF SERVICE 36

TABLE OF AUTHORITIES

CASES	PAGE
Bell v. Duckworth, 861 F.2d 169 (7th Cir. 1988)	18
Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991)	21
Cain v. Cupp, 442 F.2d 356 (9th Cir. 1971)	19
Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973)	21
Coleman v. Thompson, 501 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)	31, 32
Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991)	12
Derden v. McNeel, 978 F.2d 1453 (5th Cir. 1992) . . .	2, 13, 17, 21, 26, 27, 29, 31, 33
Derden v. State, 522 So.2d 752 (Miss. 1981)	3
Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)	29, 30
Dudley v. Duckworth, 854 F.2d 967 (7th Cir. 1988)	18
Ewing v. Williams, 596 F.2d 391 (9th Cir. 1979)	19

Lee v. Lockhart, 754 F.2d 277
(8th Cir. 1985) 25

Lincoln v. Sunn, 807 F.2d 805
(9th Cir. 1987) 20

Lundy v. Campbell, 888 F.2d 467
(6th Cir. 1989) 17

McCleskey v. Zant, 499 U.S. ___,
111 S.Ct. 1454, 113 L.Ed.2d 517
(1991) 31, 32

McDowell v. Leapley, 984 F.2d 232
(8th Cir. 1993) 21

Monk v. Zelez, 901 F.2d 885
(10th Cir. 1990) 21

Payne v. Janasz, 711 F.2d 1305
(6th Cir. 1983) 17

Scott v. Jones, 915 F.2d 1188
(8th Cir. 1990) 21

SS Monrosa v. Carbon Black Export, 359
U.S. 180, 79 S.Ct. 710,
3 L.Ed.2d 723 *(1959)* *22, 23*

Strickland v. Washington, 466 U.S.
668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 19

Teague v. Lane, 489 U.S. 288,
109 S.Ct. 1060, 103 L.Ed.2d 334
(1989) 31

United States v. Lovasco, 431 U.S.
783, 97 S.Ct. 2044, 52 L.Ed.2d
752 (1977) 30

Walker v. Davis, 840 F.2d 834
(11th Cir. 1988) 19

Walker v. Engle, 703 F.2d 959
(6th Cir. 1983) 17

Yohey v. Collins, 985 F.2d 222
(5th Cir. 1993) 29

AMENDMENTS, STATUTES AND RULES **PAGE**

28 U.S.C. §1254(1) 2, 22

28 U.S.C. §2254(a) 2

NO. 92-1558

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GEORGE GUY DERDEN, III
Petitioner

versus

SHERIFF SAMMIE McNEEL and
MISSISSIPPI DEPARTMENT OF CORRECTIONS
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

INTRODUCTION

Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment of that court denying petitioner's request for habeas corpus relief.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals was rendered on December 16, 1992 in *Derden v. McNeel,* 978 F.2d 1453 (5th Cir. 1992). A copy of the opinion of the Court of Appeals is before this Court as Appendix A to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court through the statutory authority of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner asserts that this case involves the application of the Fourteenth Amendment of the United States Constitution and the federal statute numbered 28 U.S.C. §2254(a). Both the amendment and

the statute are set out at page 2 of the petition.

STATEMENT OF THE CASE

A. Procedural History.

A detailed description of the procedural chronology of this case is presented herein to reflect the ever-changing nature of this petitioner's purported 'cumulative error' claim.

The case at bar was originally prosecuted in the Circuit Court of Clay County, Mississippi. George Guy Derden was indicted by the Clay County grand jury for the crime of burglary. In April, 1986, he was tried, convicted, and sentenced by the trial court to a term of seven (7) years in the custody of the Mississippi Department of Corrections. ***Derden v. State,*** 522 So.2d 752 (Miss. 1981).

Derden appealed his conviction and sentence to the Mississippi Supreme Court, basing his request for relief on three major assignments of error.

1. Derden was denied a fair trial in violation of the due process clauses of the Mississippi and United State Constitutions.

   a) Evidence of fundamental unfairness was adduced at the pretrial hearing.

   b) The prosecution's obtaining promises by the jurors to believe the State's co-conspirator witnesses, contributed to the denial of a fair trial.

   c) The trial judge's frustrating defense counsel's attempt to make an opening statement contributed to an unfair trial.

   d) The trial judge's commenting that neither he nor the jury "cared" about one of the accused's defenses, contributed to the denial of a fair trial.

   e) The trial judge's continuous correction of the accused, and admonitions to him in front of the jury contributed to the denial of a fair trial.

f) The trial judge's admission of the hearsay statement by Richard Dismuke that Derden had not been at the Apollo Club on the night of the burglary in question contributed to the denial of a fair trial.

g) The two and one-half year delay in the trial contributed to the denial of a fair trial.

h) Permitting the co-indictee, Pam Smith, to be cross-examined about her failure to come forward with a statement concerning the burglary, contributed to the denial of a fair trial.

i) Permitting the jury to hear evidence of other crimes contributed to the denial of a fair trial.

2. A directed verdict should be entered; alternatively, the verdict was against the overwhelming weight of the evidence.

3. The sentence was excessive.

Only one of the claims asserted, 1.b., was deemed worthy of discussion. In affirming the conviction, the Mississippi Supreme Court determined that any error committed by the prosecution during voir

dire was corrected by the granting of a cautionary instruction. *Id.* at 755. The Mississippi court concluded by finding that "[t]he other assignments of error have been studied and are without merit and unworthy of discussion." *Id.* [Emphasis added.]

Derden next sought relief by means of a petition for writ of habeas corpus with the United States District Court for the Northern District of Mississippi, Eastern Division, filed July 19, 1988. The same three major assignments of error presented to the Mississippi Supreme Court were set forth in the petition as grounds for relief. For "supporting facts", Derden simply attached a copy of the brief filed in the Mississippi Supreme Court on direct appeal.

The ever-changing nature of a cumulative error theory first became

apparent when Derden filed a second petition attacking the same conviction. This petition alleged new and different grounds for relief. By order dated December 20, 1989, the Magistrate Judge determined that the second petition would be considered as an amendment to the original petition. Two grounds for relief were added.

1. Petitioner was denied "a fair trial in a fair tribunal", a matter of basic law.[1]

2. Former jury verdict, when weighed in the "new light" of the time factor/frame, was totally against the weight of the state's evidence.

On February 7, 1990, the Magistrate Judge issued a Report and Recommendation.[2]

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[1]From the Supporting Facts it appears that the claim is that the state withheld exculpatory evidence.

[2]Derden mailed an amended petition for relief on January 31, 1990. The amendment expanded one ground for relief and added a new ground. This amendment was received by the District Court <u>after</u> the Report and Recommendation had issued.

The merits of each of the nine instances of alleged error which Derden argued had denied him a fair trial, were discussed. The Magistrate concluded that none of these alleged errors constituted a constitutional violation and that, standing alone, the alleged errors did not render the entire trial fundamentally unfair. However, the Magistrate recognized cumulative error as a theory for relief and found that "the trial judge's demeanor" in combination with "the prosecutor's over-zealous actions" produced a prejudicial atmosphere that prevailed throughout Derden's trial. The

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An order was entered by which the court declined to permit the amendment "at this late date". The District Court found that the expanded ground had been fully addressed in the Report and Recommendation and that the new ground had never been submitted to the state courts for consideration.

Report and Recommendation rejected Derden's remaining claims.[3]

Both Petitioner and Respondents objected to the Report and Recommendation. Respondents contended: 1) that Derden had not raised a cumulative error claim and the District Court was thus precluded from considering such a claim; 2) based on precedent of the Fifth Circuit, cumulative error was not a proper basis for habeas corpus relief; and, 3) since none of the individual claims rose to the level of a constitutional violation, habeas relief was not warranted.

The Memorandum Opinion in this cause was issued March 19, 1991. That Opinion

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[3]The remaining claims, simplified, are: 1) a directed verdict should have been entered or, alternatively, the verdict was against the overwhelming weight of the evidence; 2) the sentence imposed was excessive; 3) the state withheld evidence; and, 4) assistance of trial counsel was ineffective.

found that Fifth Circuit Court of Appeals precedent controlled the cumulative error question and that that court did not recognize the cumulative error theory as a basis for relief. Finding that none of the alleged violations rose to the level of constitutional error, the District Court held that Derden was not entitled to habeas corpus relief. That Court also held:

> Even if the cumulative error argument were recognized by the Fifth Circuit and the prejudices suffered by petitioner due to errors that, by themselves, do not reach constitutional magnitude could be aggregated, the court disagrees with the magistrate that the case *sub judice* is one where the aggregate of the errors produced a trial that was so fundamentally unfair that petitioner was denied due process of law.

The remainder of the Report and Recommendation which rejected Derden's other

claims was adopted as the opinion of the District Court.

On appeal to the Fifth Circuit Derden argued first that cumulative error was a proper basis for federal habeas corpus relief and, second, that the aggregate of errors in his case was such that relief was warranted under this theory. However, as alleged errors under the cumulative error theory, Derden re-mixed his bag of claims, adding to his cumulative error argument some of the claims which had been considered separate and apart from the cumulative error theory by the District Court.[4]

A panel of the Court of Appeals agreed with Derden's first argument and,

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[4]The claims outlined in Note 3. These claims had been presented and rejected separately both in the Report and Recommendation and in the District Court's opinion.

for the first time, recognized cumulative error analysis in the context of habeas corpus relief. The only standard of review provided by the panel opinion was a test of "whether the trial taken as a whole [was] fundamentally unfair." ***Derden v. McNeel,*** 938 F.2d 605, 609 (5th Cir. 1991). Over strong dissent, the panel also accepted Derden's second argument. ***Derden,*** 938 F.2d at .

Respondents filed a Suggestion for Rehearing En Banc which was denied on September 13, 1991. On further consideration, the Court ordered that the cause be reheard by the Court en banc without oral argument.

On December 16, 1992, the Court of Appeals issued an ***en banc*** opinion which again recognized cumulative error as a theory of habeas relief. However, that

opinion provided standards by which such a claim for relief could be reviewed.

> After ***en banc*** rehearing, we now hold that federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors "so infected the entire trial that the resulting conviction violates due process." ***Cupp v. Naughten,*** 414 .S. 141, 147, 94 S.Ct. 396, 400-01, 38 L.Ed.2d 368 (1973).

Derden, 978 F.2d at 1454.

The ***en banc*** court concluded that Derden's case failed to satisfy these standards. The judgment of the district court denying habeas corpus relief was affirmed by the Fifth Circuit. ***Derden,*** 978 F.2d at 1461.

From this ruling, Derden petitions for a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals in this cause.

B. **Statement of Facts.**

On February 10, 1983, someone broke into Wade's Grocery in Pheba, Mississippi, and removed a safe. Two and a half years later, George Guy Derden was indicted for this burglary. At trial, three persons who admitted taking part in the burglary testified for the state. These three testified that they left West Point, Mississippi, along with Derden and his girlfriend, and drove to Pheba where they broke into the grocery. While they were removing the safe, an approaching car interrupted the burglary. The group broke up and the two resulting parties eventually ended up back in West Point.

Derden testified in his own behalf and offered an alibi defense. His testimony was supported by that of his girlfriend and two of his employees. However, the jury did not believe the

alibi defense and found Derden guilty of burglary.

REASONS FOR DENYING THE WRIT

This cause, arising from the Fifth Circuit Court of Appeals which now stands with the majority of circuits in recognizing cumulative error as a basis for federal habeas relief, does not present the meaningful litigation required for the grant of certiorari.

Given the variable and speculative nature of cumulative error as a ground of federal habeas corpus relief, the three conditions proscribed by the *en banc* opinion for the grant of relief on this ground are reasonable.

ARGUMENT

I. This cause, arising from the Fifth Circuit Court of Appeals which is now aligned with the majority of circuits in recognizing cumulative error as a basis for federal habeas relief, does not present the meaningful litigation required for a grant of certiorari.

Derden argues that certiorari should be granted in this cause "because the Fifth, Sixth, Seventh, and Eighth Circuits are in conflict on this important legal principle." Petition at 6. Respondents submit that this cause, arising from the Fifth Circuit Court of Appeals which now stands with the majority of circuits in recognizing cumulative error as a basis for habeas relief, does not present the meaningful litigation required for the grant of certiorari.

Broadly stated, the lower court found that "federal habeas relief may issue if a

defendant was denied fourteenth amendment due process by the cumulative effect of errors committed in a state trial, which together deny fundamental fairness." ***Derden,*** 978 F.2d at 1456. This general finding is subject to the satisfaction of three conditions. ***II., infra.***

When the Fifth Circuit Court of Appeals issued its ***en banc*** opinion in this cause, the lower court joined the two other circuit courts which have specifically adopted the cumulative error theory of relief. Representative decisions of the Sixth Circuit Court of Appeals include: ***Lundy v. Campbell,*** 888 F.2d 467 (6th Cir. 1989), ***cert. denied,*** 495 U.S. 950, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990); ***Payne v. Janasz,*** 711 F.2d 1305 (6th Cir. 1983), ***cert denied,*** 464 U.S. 1019, 104 S.Ct. 552, 78 L.Ed.2d 726 (1983); **Walker v. Engle,** 703 F.2d 959 (6th

Cir. 1983), *cert denied,* 464 U.S. 951, 104 S.Ct. 367, 78 L.Ed.2d 327 (1983). *Bell v. Duckworth,* 861 F.2d 169 (7th Cir. 1988), *cert. denied,* 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989), issued by the Seventh Circuit Court of Appeals, recognizes cumulative error within the context of the "management of a state criminal trial".[5] *Id.* at 170.

Other circuits have also acknowledged the viability of the cumulative error theory, albeit within the embrace of a specific constitutional claim. For example, both the Ninth and the Eleventh Circuit Courts of Appeals will review

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[5]We note that in so holding, the Seventh Circuit relied upon its decision in *Dudley v. Duckworth,* 854 F.2d 967 (7th Cir. 1988). A single error which "appear[ed] . . . to be of constitutionally significant proportions" was at issue and required reversal. However, the Seventh Circuit also stated that "[v]iewed as a whole, the petitioner's trial was constitutionally unfair." *Id.* at 972.

alleged errors cumulatively to assess prejudice for a ***Strickland v. Washington***[6] claim. ***Ewing v. Williams,*** 596 F.2d 391, 395 (9th Cir. 1979) (prejudice may result from the cumulative impact of multiple deficiencies); ***Walker v. Davis,*** 840 F.2d 834, 838 (11th Cir. 1988) (whether cumulative trial errors can be said to have, in reasonable probability, changed the result at trial).

The Ninth Circuit also will review alleged instances of prosecutorial misconduct within a cumulative error context. *Cain v. Cupp,* 442 F.2d 356, 358 (9th Cir. 1971) ("...failures to disclose may not in themselves be sufficient to justify relief, but they reveal the errors in Petitioner's trial, which, when taken

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[6]466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

together, deprived him of the fair trial to which he was entitled.")

However, the Ninth Circuit appears to recognize cumulative error in and of itself as a basis for habeas relief. In ***Lincoln v. Sunn,*** 807 F.2d 805 (9th Cir. 1987), the Court of Appeals remanded a habeas petition on questions of prosecutorial comment and lack of notice by the indictment. However, direction to the district court included the admonition that "the district court should determine whether this error, in conjunction with the other alleged errors, cumulatively deprived Lincoln of his rights." ***Id.*** at 814, n.6.

Thus in its ***en banc*** holding, the Fifth Circuit by proclamation and by fact joined the majority of the circuit courts which have enabled a petitioner to seek federal habeas corpus relief through a

claim of cumulative error.[7] *Derden*, 978 F.2d at 1456. Standing alone against these circuits is the Eighth Circuit Court of Appeals. That Court as recently as three months ago reaffirmed its holding that "cumulative error is not grounds for federal habeas relief as 'each habeas claim must stand or fall on its own'." *McDowell v. Leapley*, 984 F.2d 232, 235 (8th Cir. 1993), (*quoting Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990)).

Where there is a conflict among the federal courts of appeals, this Court will grant certiorari to resolve the conflict. *Chaffin v. Stynchcombe*, 412 U.S. 17, 21,

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[7]Of the remaining circuits, excepting the Eight Circuit, respondents have been able to discover only one additional circuit where cumulative error has been raised. Such a claim was asserted, but not addressed, in *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991), and *Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990), before the Tenth Circuit Court of Appeals.

93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); 28 U.S.C. §1254(1). However, this Court has also stated that while it decides questions of public importance, "it decides them within the context of meaningful litigation." ***SS Monrosa v. Carbon Black Export,*** 359 U.S. 180, 184, 79 S.Ct. 710, 3 L.Ed.2d 723, ***reh. denied,*** 359 U.S. 999, 79 S.Ct. 1115, 3 L.Ed.2d 986 (1959).

Respondents submit that the litigation at hand is not "meaningful" within the Court's intended sense of the word. The Fifth Circuit's opinion in this cause fuses the position of that court with all but one of the courts of appeals which have directly considered the question. In spite of the guidance provided by the holdings of its sister circuits, it is the Eighth Circuit's holding regarding cumulative error which is singular.

This Court has also stated that "[i]ts function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *SS Monrosa*, 359 U.S. at 184. To grant certiorari in the case at bar would be to 'manage' the minority ruling of the Eighth Circuit through the opinion of the Fifth Circuit which has united with the Sixth, Seventh, and, apparently, Ninth Circuits in considering cumulative error as a viable claim for habeas relief.

The Fifth Circuit having now joined the direction provided by a majority of the courts of appeals who have considered the issue, it is the Eighth Circuit which continues to swim against the tide. Respondents submit that an opinion from that circuit would provide the meaningful litigation necessary to resolve the conflict between that circuit and the

remaining circuits which have adopted cumulative error as a theory of habeas relief.

II. Given the opportunity afforded by cumulative error relief to aggregate, without limit, adverse trial events, the standards imposed by the lower court's opinion provide reasonable and needed confines within which to review such a claim.

Petitioner argues that the three conditions imposed by the Court of Appeals "unduly restrict[] the concept of cumulative error." Petition at 7. Respondents urged the court below to reject cumulative error as an inappropriate theory on which to base a grant of habeas corpus relief. Given that position, which we do not waive, we would submit that the standards proscribed by the *en banc* opinion are reasonable given the nature of the ground of relief at issue.

A petitioner seeking relief by means of the Great Writ must show that he or she is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. 2254(a). Prior to the advent of cumulative error, each individual error asserted was assessed as to whether that error constituted a violation of the Constitution or laws or treaties of the United States. *See e.g., Lee v. Lockhart,* 754 F.2d 277, 279 (8th Cir. 1985) (each claim of a constitutional deprivation asserted in a petition for federal habeas corpus must stand on its own, or, as here, fall on its own[.]).

With the departure of the circuit courts into the realm of cumulative error, however, a habeas petitioner is now free to go fishing in the waters of his record to aggregate sufficient non-Constitutional errors to entitle him to relief. Given

the kaleidoscope of alleged non-Constitutional errors which could be gleaned from a trial of any notable length, we submit the lower court was correct in adopting "a particularly cautious approach to granting habeas relief for cumulative errors". *Derden,* 978 F.2d at 1457. Judge Jones, writing for the *en banc* court stated.

> "Cumulative error" is an infinitely expandable concept that, allowed to run amok, could easily swallow the jurisprudence construing the specific guarantees of the Bill of Rights and determining minimum standards of procedural due process. Under its aegis, an error that would not have risen to constitutional dimension by itself might suddenly, when aggregated with other non-constitutional errors, become worthy of habeas relief. The legal certainty afforded by rules drawn from the specific Bill of Rights provisions related to criminal law could then yield to the subjectivity of fundamental fairness determinations. Worse yet, a free-floating fundamental fairness rule subverts the uniformity of results that is the basic goal of an organized legal system:

> one defendant may persuade the court that his five non-constitutional errors denied fundamental fairness, while another, less imaginative, may be denied relief simply because he cited only four of the same errors out of the record.

Derden, 978 F.2d at 1457-58.

The case ***sub judice*** proves Judge Jones point. A brief review of the Procedural History, ***infra,*** reveals an ever-changing combination of alleged errors presented under the broad umbrella of cumulative error as this cause wound its way through the review process. ***See also, Derden,*** 978 F.2d at 1461.

The subjectivity of cumulative error without reasonable, objective standards as described by the lower court is also proved by the various conclusions reached by the reviewers of this cause. Three reviewers weighed in with the determination that Derden's trial was not fundamen-

tally unfair: the unanimous Mississippi Supreme Court; the federal district judge; and, the dissent from the panel opinion. However, two reviewers weighed in with the opposite determination: the magistrate judge and the panel majority.

Thus the broad, subjective nature of this basis of relief dictates that reasonable standards of review be imposed. Respondents submit that the conditions upon which relief will be based are reasonable given the above discussed nature of a cumulative error claim.

> (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law;
>
> (2) the errors were not procedurally defaulted for habeas purposes; and
>
> (3) the errors "so infected the entire trial that the resulting conviction violates due process."

Derden, 978 F.2d at 1454 [citation omitted.]

See Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993) (following *Derden*)

Petitioner questions the lower court's concern with the subjective nature of this claim, arguing that fundamental fairness is, by definition, "subjective and free-floating.[8] However, as recognized by the Fifth Circuit, this Court has very narrowly defined the category of infractions that violate 'fundamental fairness. *Derden,* 978 F.2d at 1457, *quoting Dowling v. United States,* 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708

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[8]The *en banc* court noted that basing a cumulative error theory of relief on *Rochin v. California,* 342 U.S. 165, 173, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952), is "rather like citing the Declaration of Independence: general statements about inalienable rights or "fundamental fairness" tell us little about the prerogatives of an individual in concrete factual situations.

(1990). The ***Dowling*** court continued by quoting from ***United States v. Lovasco,*** 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

> Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." Rochin v California, 342 US 165, 170 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396 (1952). Our task is more circumscribed. We are to determine only whether the action complained of . . . violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," Mooney v Holohan, 294 US 103, 112, 79 L Ed 791, 55 S Ct 340, 98 ALR 406 (1935), and which define "the community's sense of fair play and decency," Rochin v California, supra, at 173 96 L Ed 183, 72 S Ct 204, 25 ALR2d 1396.

Lovasco, 431 at 790.

We submit that the ***en banc*** opinion does <u>not</u> "obliterate" cumulative error as a form of relief. The lower court

conceded that a complete definition of unconstitutional cumulative error was not feasible. However, the court attempted to balance cumulative error as a basis for habeas relief with this Court's established limits on the scope of federal habeas. ***Derden,*** 978 F.2d at 1458. The Fifth Circuit used as illustrations of the various restrictions placed on access to habeas relief this Court's recent decisions in ***Coleman v. Thompson,*** 501 U.S. _ , 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), ***McCleskey v. Zant,*** 499 U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), and ***Teague v. Lane,*** 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). A rudimentary comparison of the standards imposed by these cases concerning the applicability of procedural default rules to the minimum standards imposed in the case at bar reflects no "decimation" of cumulative

error. Instead, these minimum standards provide, as do ***Coleman***, ***McCleskey***, and ***Teague***, an objective gauge by which federal habeas relief can be consistently granted.

A requirement that errors asserted not be procedurally defaulted is well-established in habeas litigation. We would submit that to require the errors submitted to be of constitutional "dimension" differs from petitioner's implicit conclusion that such errors be actual constitutional violations. An alleged trial error may fall outside the boundary of an explicit violation, and thus be insufficient in and of itself to sustain a claim for habeas relief. However, that same error may touch upon or implicate a specific constitutional right and thus be sufficient to sustain cumulative error.

Additionally, we submit that the lower court's reiteration of this Court's own standard regarding review of fundamental fairness claims can not be "unduly restrictive". A complete quotation of this third standard is of aid.

> These cases fit the Supreme Court's description of a denial of due process as "the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that *the absence of that fairness fatally infested the trial;* the acts complained of must be of such quality as *necessarily prevent a fair trial."* ***Lisenba v. California,*** 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166 (19410 (emphasis added).

Derden, 978 F.2d at 1457 [emphasis added]. To require that a group of alleged errors meet this standard as opposed to a single constitutional violation does not further limit cumulative error relief nor relegate

the whole of the standard to the position of one of three standards.

The standards proscribed by the *en banc* opinion are reasonable given the variable and speculative nature of cumulative error as a ground of federal habeas corpus relief.

CONCLUSION

For the above and foregoing reasons the decision of the United States Court of Appeals for the Fifth Circuit affirming the District Court's denial of habeas corpus relief was proper. No writ of certiorari should issue nor plenary review granted in this case.

Respectfully submitted,

MIKE MOORE
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CERTIFICATE OF SERVICE

I, Charlene R. Pierce, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit** to the following:

Hon. Leslie Joyner Bobo
Butler, Snow, O'Mara,
Stevens & Cannada
Post Office Box 22567
Jackson, Mississippi 39225-2567

This the 13th day of May, 1993.

Charlene R. Pierce

CHARLENE R. PIERCE